

**No. 04-15979**

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IN THE UNITED STATES COURT OF APPEAL  
FOR THE NINTH CIRCUIT

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**CHRISTOPHER MacDONALD,**

Plaintiff - Appellant,

v.

**KAHIKOLU, LTD., dba Frogman Charters,**

Defendant - Appellee,

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On Appeal from the United States District Court  
For the District of Hawaii  
DC No. Cv-02-00084 LEK  
The Honorable Leslie E. Kobayashi, Presiding Judge

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**APPELLEE/RESPONDENT KAHIKOLU, LTD.'S  
PETITION FOR PANEL REHEARING**

OF DEFENDANT - APPELLEE  
KAHIKOLU, LTD., dba Frogman Charters

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RICHARD C. WOOTTON (SBN 88390)  
FREDERICK J. CARR (SBN 154457)  
COX, WOOTTON, GRIFFIN,  
HANSEN & POULOS, LLP  
190 The Embarcadero  
San Francisco, CA 94105  
Telephone: 415-438-4600  
Facsimile: 415-438-4601

Attorney for Defendant - Appellee  
KAHIKOLU, LTD., dba Frogman Charters

**EXHIBIT B**

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## **I. INTRODUCTION AND STATEMENT OF COUNSEL**

Kahikolu, Ltd., Appellee in *Christopher MacDonald v. Kahikolu Ltd.*, No. 04-15979 seeks rehearing of the March 31, 2006 Panel decision (A.L. Alarcón) concerning the plaintiff's "negligence per se" cause of action. The Panel vacated the district court judgment and remanded the action for the sole reason and with the express instruction that "the district court determine whether the failure of Kahikolu to comply with Coast Guard regulations played any part, 'even the slightest,' in producing Mr. MacDonald's injuries...."

Kahikolu Ltd. seeks Panel rehearing on the above issue. Counsel respectfully submits that the Panel's Opinion overlooked material points of fact in its decision and believes that the district court's Statement of Facts and Conclusions of Law make it crystal clear that that court impliedly found that Kahikolu Ltd.'s failure to comply with Coast Guard regulations did not play any part, *even the slightest*, in producing Mr. MacDonald's injury. As such, this action need not be remanded and the district court's April 28, 2004 decision should be affirmed.

## **II. PERTINENT FACTS**

The district court opinion acknowledged under the heading of "Negligence Per Se" that "plaintiff argues that defendant was negligent because it violated

Coast Guard diving regulations, 46 C.F.R. §§ 197.200-197.480 and specifically § 197.420(a)(1)-(1), in failing to “[p]rovide an operations manual to the person in charge prior to the commencement of any diving operation; and ... [m]ake an operations manual available at the dive location to all members of the dive team.” (District Court opinion p. 9 para. 6) As the 9<sup>th</sup> Circuit Court correctly noted, it is “undisputed that Kahikolu failed to comply with [that] Coast Guard regulation.” (Cir. Ct. opinion at 06 C.D.O.S., 2711, 2712)

This Court also recognized that “Mr. MacDonald *contends* that his expert, Mark Almaraz, established a causal connection between the duty to provide a dive manual and Mr. MacDonald’s injury when he testified that free dives to depths below twenty feet are unsafe and that a failure to have a dive operations manual on board contributed to Mr. MacDonald’s injury because such manual “identifies any potential unsafe practices.”” (9<sup>th</sup> Cir. Ct. Opinion at CDOS p. 2712 (emphasis added))

The district court concluded however that:

- 1) “Defendant employs crewmembers ...whose daily job responsibilities include routinely making free dives... to depths in excess of 20 feet....”  
(Finding of Fact No. 5.)
- 2) “Because the deckhands’ duties included free diving, Defendant only hired

into the position people with at least a base level of competence in free diving.” (Finding of Fact No. 6.)

- 3) “Plaintiff was an experienced swimmer who met a base level of competence in free diving and quickly became an accomplished free diver.” (Finding of Fact No. 7)
- 4) “[T]he court finds that free diving is not an inherently dangerous activity, and safely equalizing pressure is an easily learned skill, - - often times without formal training and through mere trial and error.” (Finding of Fact No. 9.)
- 5) “Plaintiff worked 86 days and made 120 trips as a deckhand before his injury [] and regularly and frequently made free dives to depths of 30, 40, and 50 feet without apparent ear pain or other ear-related injury. [] The Court finds, from the evidence, that Plaintiff as an accomplished free diver. ... As a result, the Court further finds that Plaintiff was familiar with and knew how to safely equalize pressure in his ears.” (Finding of Fact No. 19.)

### **III. LAW AND ARGUMENT**

#### **A. Reconsideration is Available and Appropriate Here**

As this Court well knows, “[t]he purpose of petitions for rehearing, by and large, is to ensure that the Panel properly considered all relevant information in

rendering its decision.” *Amster v. United States Dist. Ct.*, 806 F.2d 1347, 1356 (9<sup>th</sup> Cir. 1986) (Emphasis added) Consistent with *Amster*’s mandate, this court granted rehearing in a case after it had held that it lacked jurisdiction to review the plaintiff’s procedural due process claims. The court granted plaintiff’s motion for rehearing on the grounds that the original record on appeal was incomplete and suggested that the plaintiff had not exhausted his administrative remedies when in fact he had. *Silva-Calderon v. Ashcroft*, 371 F.3d 1135 (9<sup>th</sup> Cir. 2004) Likewise, Kahikolu Ltd. respectfully submits that the Panel did not give sufficient weight to the district court’s findings of fact and if it had, it would have concluded that the district court had unequivocally, impliedly found that the failure to have a dive operations manual on board the vessel at the time of the incident giving rise to plaintiff’s injury, played no part, “even the slightest,” in causing the injury.

**B. This Court Did Not Give Sufficient Weight to the District Court’s Findings Of Fact**

After extensive consideration of the arguments presented by the parties, the district court impliedly dismissed plaintiff’s contention that his expert, Mark Almaraz, “established a causal connection between the duty to provide a dive manual and Mr. MacDonald’s injury when he testified that free dives to depths below twenty feet are unsafe and that a failure to have a dive operations manual on

board contributed to Mr. MacDonald's injury because such manual "identifies any potential unsafe practices." (9<sup>th</sup> Cir. Ct. opinion at CDOS p. 2712 (emphasis added)).

In order for the lack of a dive manual to have played a part in causing the plaintiff's injury, it would have had to identify free diving below 20 feet as an "unsafe practice." Only in that way could there be *any* causal connection to the plaintiffs' injury. However, the district court concluded from several different perspectives that diving below 20 feet was simply not unsafe.

As the district court found, "Defendant employs crewmembers ...whose daily job responsibilities include *routinely making free dives... to depths in excess of 20 feet....*" (Finding of Fact No. 5.) Defendant only hired into the position people with *at least a base level of competence* in free diving." (Finding of Fact No. 6.) "*Plaintiff ... met a base level of competence in free diving and quickly became an accomplished free diver.*" (Finding of Fact No. 7) "*Plaintiff was an accomplished free diver.*" (Finding of Fact No. 19.) "*[F]ree diving is not an inherently dangerous activity, and safely equalizing pressure is an easily learned skill, - - often times without formal training and through mere trial and error.*" (Finding of Fact No. 9.)

While Kahikolu Ltd. agrees that the district court never *expressly* stated that



it believed that the lack of a dive operations manual did not play any part, even the slightest, in causing Mr. MacDonald's injury, it is unequivocal that the even if such a manual had been on board the vessel, it would have had to provide that free diving below 20 feet was unsafe. That is a conclusion that the district court considered at length and expressly rejected: "[F]ree diving is not an inherently dangerous activity." Had the court stated that free diving *could* be dangerous, or was dangerous at the depth that the plaintiff was diving when injured, plaintiff would have met his slight burden of proof in regard to causation, but that simply and clearly was not the case here.

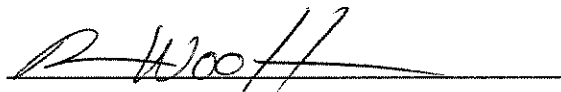
#### IV. CONCLUSION

For the foregoing reasons, Kahikolu Ltd. respectfully requests rehearing of the issues identified above or that the Panel withdraw its March 31, 2006 decision and issue a new decision affirming the district court judgment.

Dated: April 13, 2006

COX, WOOTTON, GRIFFIN,  
HANSEN & POULOS, LLP  
Attorneys for Defendant KAHIKOLU, LTD.  
dba Frogman Charters

By:



Richard C. Wootton

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,246 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)ii.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in 14 point and Times New Roman style.

Dated: April 13, 2006

COX, WOOTTON, GRIFFIN,  
HANSEN & POULOS, LLP  
Attorneys for Defendant-Appellee  
KAHIKOLU, LTD.  
dba Frogman Charters

By:   
Richard C. Wootton

**PROOF OF SERVICE**

Case: **Christopher MacDonald v. Kahikolu, Ltd dba Frogman Charters**

Case No.: **U.S. Court of Appeal, 9<sup>th</sup> Circuit Docket No.: 04-15979**

I am employed in the City and County of San Francisco by the law firm of COX, WOOTTON, GRIFFIN, HANSEN & POULOS, LLP, 190 The Embarcadero, San Francisco, California 94105. I am over the age of 18 years and not a party to the within action.

On April 13, 2006, I served the attached document(s):

**APPELLEE/RESPONDENT KAHIKOLU, LTD.'S  
PETITION FOR PANEL REHEARING**

on the parties, through their attorneys of record, by placing copies thereof in sealed envelopes (except facsimile transmission(s)), addressed as shown below, for service as designated below:

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(C) By Messenger Service: I caused each such envelope to be delivered to a courier employed by FIRST LEGAL SUPPORT SERVICES, with whom we have a direct billing account, who personally delivered each such envelope to the addressee(s) on the date indicated.

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C	Office of the Clerk U.S. Court of Appeals 95 Seventh Street San Francisco, CA 94103 Tel: (415) 556-9730	An Original & 3 Copies
A, E	Howard G. McPherson Cronin Fried Sekiya Kekina & Fairbanks 841 Bishop St., Ste. 600 Honolulu, HI 96813 Tel: (808) 524-1433 Fax: (808) 536-2073	Attorney for Appellant Christopher MacDonald (2 Copies)
C	John R. Hillsman McGuinn, Hillsman & Palefsky 535 Pacific Ave. San Francisco, CA 94133 Tel: (415) 421-9292 Fax: (415) 403-0202	Co-Counsel for Appellant (2 Copies)

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed this April 13, 2006, at San Francisco, California.

/S/

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Terri M. Yee